Reviews

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The Land Use Mire

Allison Dunham†


The law concerned with guiding the physical development and location of activities that use land is almost as old as the current Key Number system; but it was only in 1956 that a portion of that subject—zoning—was identified with a separate title. Prior to World War II the law schools considered the subject as part of "municipal law" and treated it on a par with the regulation of barber shops, pool halls, peddlers, and other types of minor private conduct. Even after the War one of the two major new treatises on property law ignored the subject.1 Similarly, the codifiers and statutory revisors have had difficulty in assigning a niche to the subject. They have produced not only separate types of legislation for each kind of government authorized to deal with land use (cities, villages, towns, and counties) but also separate nomenclatures for each new type of problem. Thus, after developing "zoning" as a device for segregating land use, the legislatures have now enacted special legislation for "planned development districts" as a means for mixing up the uses again. It is odd that the federal activity since the 1920's dealing with urban land development has not produced as much standardization in land use law terminology as similar federal activity has in public health and welfare law and labor law.

One would expect that a major treatise on "zoning" published in 1968 would deal with this terminological and conceptual morass and not only define those aspects of land use regulation that ought to be considered under the "zoning" rubric, but also provide a schema for

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classifying, defining, and understanding the law concerned with land use. Instead, this four volume treatise\(^2\) makes almost no reference to air and water pollution laws, to state laws controlling land use around highway interchanges and location of access roads from private developments, or to state laws which establish watershed districts and strictly control land use within these areas; it makes only minor reference to “urban renewal,” and in twenty-five chapters of commentary, provides only one chapter on subdivision control, another on official maps, and two on planning. On the other hand, if one is not misled by the title word “zoning,” one can find a great deal of material in this treatise about law which permits development without regard to zone on the basis of an individual decision concerning a particular parcel of land, whether the decision be called a variance, special use permit, subdivision permit, or even urban renewal.

The author’s intention was

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\ldots \text{to marshall the significant cases and statutes relating to planning, zoning, and subdivision control, and to assemble a fair sampling of the municipal regulations as well as the administrative and judicial forms used in these areas of the law.} \]

The bulk of the cases discussed come from the courts of “the northeastern states, particularly those of New Jersey, New York and Pennsylvania [because they] decide an unusually large number of planning cases.”\(^4\) The author claims that this eastern parochialism “is inherent in the subject matter”\(^6\) despite Census Bureau, Department of Commerce, and Federal Reserve Board statistics, as well as the literature of architectural criticism, which suggest that most land use development controlled by the laws studied in the treatise has occurred elsewhere since the 1950’s. Such uneven treatment of the subject is necessary, one must admit, when land development law is studied in terms of the greatest number of precedents rather than in terms of effective use and application of the laws.

The author goes on to say,

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\text{[T]he materials [themselves] are arranged and finely subdivided in a manner intended to serve the attorney or planner who is seeking an answer or lead.} \ldots \]

\(^2\) R. Anderson, American Law of Zoning (1968) [hereinafter cited as Anderson].
\(^3\) 1 Anderson § 1.01, at 2.
\(^4\) Id. § 1.01, at 4-5.
\(^5\) Id. § 1.01, at 4.
\(^6\) Id. § 1.01, at 2.
The tax literature and looseleaf services demonstrate that an index can be “arranged and finely subdivided in a manner which assists the attorney” without compromising the goal of arranging issues intelligently and logically in the text. The author, unfortunately, has generally been satisfied with an uncritical “listing” of issues and problem areas with a resulting deemphasis or omission of many meaningful relationships. In Chapter 7, relying on a single New York case, *De Sena v. Gulde*, we find the assertion

[a] municipality is without power to enact a zoning amendment solely for the purpose of preventing riots and injuries to persons, or economic loss which might result from riots.\(^7\)

It is true that *De Sena* contains language which might lead an uncritical reader to make that assertion but the case concerned a legislative judgment that Plan A (preferred by the legislators for stimulating economic development in the community) would, because of popular hostility to the plan, tend to produce “riots and injuries to residents, merchants, and shoppers [which would] outweigh the benefits to the village from the present change”;\(^9\) therefore, the village legislators amended the zoning ordinance to change the permitted use of the land in issue from light manufacturing to residential. If the author's conclusion about this case is correct, then many architecture and city planning schools are wasting a great deal of the taxpayer's money to learn by empirical studies whether a physical layout can be devised which will help prevent crime and riot. One need not agree with Jane Jacob's argument in *The Death and Life of Great American Cities*—that the physical arrangement of city buildings, streets and parks has a significant impact on public safety—to be disturbed at the author's advice to city planners and attorneys that a zoning ordinance cannot compel a particular physical layout where its purpose is to reduce the likelihood that crime or riots will occur. Baron Haussmann used radial boulevards in his rebuilding of Paris in the mid-nineteenth century in part to control riots; and L’Enfant’s radial street plan for Washington, D.C., was adopted, in part, for a similar purpose. The issues in *De Sena* are simply not the same as those presented by a zoning ordinance which seeks to assist in the prevention of crime or riots by establishing a certain physical arrangement of buildings and streets. While it is


\(^8\) 1 ANDERSON § 7.36, at 558.

clear that constitutional doctrine in the United States attempts to prevent accomplishing such a purpose, or any governmental purpose, by Haussmann's despotic methods, it is equally clear that the general welfare clause would not outlaw a reasonable zoning plan which attempted to control crime and riots. *De Sera* might better have been placed with the material on "contract zoning"\(^{10}\) where, assuming a contract to zone in a particular way is otherwise permissible, the element of "duress" becomes a relevant contract law consideration.

While lawyers may find the "finely" classified cases of the treatise helpful, what kind of assistance does it provide the legislative draftsmen? One would expect it to be of great help since, like a scholar, a draftsman often seeks to rearrange existing case and statutory material into a more logical and orderly framework. Although this treatise suffers from the organizational faults discussed above, the organization of the material does permit an appraisal of "zoning" law which a simple digest system would not. If the draftsman keeps his distance from the minutiae of the subject matter and keeps himself from believing that the subtitle "doctors, dentists and surgeons"\(^{11}\) involves principles different from the subtitle "attorneys,"\(^{12}\) he can glean from this work many, if not most, of the relevant questions which should be posed in drafting any general revision of the subject matter. The treatise offers little insight, however, into the more general issues that must be considered in drafting zoning laws.

The treatise is conventional in ascribing to the state the function of enabling specified local governments to exercise control of land development. But one need not deny the standard rule that a local government has only the specific powers delegated to it to argue that the major function of the state zoning enabling act is to *limit* the conduct of local governments. And although the author describes the state's use of the zoning power as minimal, his materials cast doubt on this characterization and reflect, instead, the significant control which the state exerts over local governmental land use decisions.

For example, the state restricts a local government's zoning power by requiring it to follow a detailed procedure, with many more restrictions than accompany almost every other enabling statute delegating regulatory powers to local governments. Several justifications for these restrictions come to mind. First, standardizing the process by

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10. 1 ANDERSON § 8.21, at 614-20.
11. 2 id. § 10.04, at 213.
12. Id. § 10.06, at 217.
which the zoning power is exercised should simplify the task of the courts in reviewing such decisions. State law, unfortunately, falls far short of realizing this objective. The procedure required for enacting a zoning ordinance will differ from the procedure for enacting a subdivision control ordinance. And the procedure of the Board of Adjustment, which handles flexibility in zoning by granting variances or special use permits, will differ from the procedure of the Plan Commission, which handles flexibility in connection with subdivisions. Does it make any sense from the landowner's point of view to require him to follow different procedures depending upon whether he is seeking permission to develop one or fifty lots? Does it make any sense from the reviewing court's point of view that, before it can determine the merits of an attack on the procedure used by the local government, it must first determine if a "variance," or "special exception or use," or "subdivision permit" is being sought? Isn't the basic notion that the landowner is seeking to do something which he is not permitted to do as of right because of the zoning ordinance? Therefore shouldn't the procedures for seeking special permission to develop land be the same?

Another, and apparently the more important, justification for restricting zoning power is to impose the state's planning decisions on the local governments. In discussing state use of the zoning power the author suggests that the state's alternatives are limited: it can grant general power to the local government, it can regulate land development itself, or it can prepare plans with state or regional applicability. But there is another alternative: the state can enact a policy plan as a guideline for the local governments. The state enabling act could be considered, in most instances, a policy plan which directs the local government to develop land according to certain principles while giving the local government discretion in determining what specific land development activities will implement the state policy. Although the author does not consider this approach in his treatise, many examples of such planning decisions can be found in his materials:

1. the four corners of a street intersection should be zoned in the same manner;\(^\text{13}\)
2. the use of land for any educational purpose, whether public, religious, sectarian or denominational, should not be restricted;\(^\text{14}\)

\(^{13}\) See 1 id. § 5.11, at 263.
\(^{14}\) See 2 id. §§ 9.08-10, at 121-28.
3. the state public utility commission, not the local government, has the ultimate power to determine the location of utilities;\textsuperscript{15}
4. certain commercial uses (primarily extraction industries) should be allowed to continue, if once begun;\textsuperscript{16}
5. regulations within a district must be uniform for each class or kind of development permitted within that district.\textsuperscript{17}

Sometimes it is not clear if the statute is prescribing a land use policy even though it could be so interpreted. For example, where states grant public utilities or private agencies eminent domain power, it might be inferred that the state has decided that whatever land uses these utilities or agencies undertake have priority over alternative land uses. Similarly, land uses which receive tax exempt status might be considered preferred to alternative uses. Whether such statutes, or the zoning enabling statutes, in fact represent state policy decisions determining preferred land uses is critical when the courts are faced with challenges to public utility land use decisions.

The typical professional planner deplores legislative policy promulgations and argues that state planning agencies should establish such policies under broad grants of power from the legislature. The planners argue that most planning, particularly at the local level, is dependent upon specific locational concerns; since each parcel of land is different, the state can properly express its policy only through an administrative agency which can look at particular parcels. But land use policies need not be vitiated by the uniqueness of individual land parcels. That all street intersections should be permitted to be similarly developed, that education is so important that it should not be prohibited anywhere—these are the kind of decisions that legislatures can make and should be encouraged to make.

Another issue of great importance in land use development, not discussed in the treatise, is how to account for regional and state considerations in local zoning. The traditional constitutional and statutory rhetoric limits the governing body to legislation which promotes the safety, health, morals, and general welfare of the public. But which public? Is the Cook County, Illinois government required to consider only the public which lives or owns land within its jurisdiction? Or must it consider the effect its land use decisions will have on the people

\textsuperscript{15} See id. §§ 9.06, 9.32-33, at 117, 181-83.
\textsuperscript{16} See 1 id. § 6.03, at 311.
\textsuperscript{17} See id. § 5.17, at 287.
in Illinois, the Great Lakes Region, or the United States. Several models can be used that suggest the relevant publics for local governments.

How is welfare maximized under a model that considers it best that the local governments be as independent as possible? The state welfare is no more than the sum of the welfare promoted by each local government less the subtractions from welfare caused when municipality A enacts a regulation which harms the public in municipality B. Under this model the state legislature should referee such conflicts by determining what kinds of local regulations cause economic and social harm to the state and preempt local governments in those areas with state regulations. Each local government accordingly, should concern itself only with what is best for its own public within the constraints imposed by state statutes. If the ambit of local governmental authority is to be determined according to a fiduciary obligation model, a similar conclusion is suggested: a local government would breach its fiduciary duty to its constituents if it decided on one form of land use development rather than another because the former would benefit the state as a whole while providing somewhat less benefit to the local public than the latter.

The federal constitutional model seems to assume that states will regulate commerce so as to benefit maximally their own constituents; when conflict between two states or between a state and the federal government arises, the judiciary, independent of the disputing publics, determines whether the burden on interstate commerce is an “undue” or “reasonable” one. By analogy, this model requires each independent governmental unit to decide what land use development best promotes the welfare of its public; an independent third party will resolve any disputes that arise. Finally, the planning and zoning enabling acts and the planning literature appear to be based on a model of local government which require the local government to take full account of the concerns of other publics and act so as to maximize welfare for the state or region.

If any of these models is followed in current land use development law, the treatise suggests by implication that it is probably the federal constitutional model: in general, procedural, not substantive, limitations are imposed upon the local legislative and administrative zoning decisions; and when the courts are required to review local governmental decisions they do not require that the state’s welfare have been an independent factor of the decision. Almost one half of the treatise’s chapters are concerned with the problems faced by the local legislatures
and administrators in adhering to the prescribed procedures, since failure is the principal basis for attacking zoning decisions in the courts.

The procedural requirements take many forms. First, like the Department of Commerce Standard Zoning Enabling Act, most state statutes require that a local ordinance be enacted only after a set of recommendations (which may be in statutory form) has been specifically prepared by a zoning or planning commission which has held one or more public hearings. The Standard Zoning Enabling Act, however, does not extend these strict requirements to amendments, even though the amendment may substitute a completely new ordinance for the existing one. The enabling acts usually require that public hearings be held before the legislative body, in addition to those held before the administrative or executive commissions; but the legislature is not bound by either the zoning commission recommendations or the points developed at the legislative hearings. The cases which the author discusses in this area suggest that the attempts to rationalize and objectify the decision-making process have not been effective—the cases deal with the disqualification of legislators for personal interest, bias, prejudgment, or improper influence.

Second, most state statutes require that zoning decisions be consonant with a comprehensive plan. The courts quickly read this requirement out of the statute by concluding that a plan is inherent in preparing and enacting a zoning ordinance. The plan is therefore what is enacted, no prior statement of the plan is required, and landowners will probably be unsuccessful in challenging a zoning ordinance on these grounds.

Third, traditional administrative law requires that when power is delegated to an agency such as a planning commission or board of zoning appeals, it be delegated according to a standard which governs the administrator's conduct. If the agency participates in the adjudicatory process, it must give notice of the issues to the interested parties, hold hearings, and issue findings of fact which support the decision. The cases dealing with these issues which the author presents demonstrate the inadequacy of this approach for restricting an administrator's power. A standard which authorizes a special permit to be issued "where the public welfare will be served and the neighborhood not injured" is scarcely a greater limit on administrative judgment than the similar constitutional limit on legislative judgment. To restrict the grant of power ceded to local adjudicatory agencies, many ordinances now state that a finding of fact which merely restates the terms of the
ordinance or standard is insufficient for compliance with the required procedure.

Although the treatise is primarily intended as a tool for the private or city attorney, it does provide the legislative draftsman with a substantially complete list of the problems to which his attention should be addressed. The materials collected in the treatise demonstrate that a local government can be given broad powers to control the land use decisions of a private landowner. But can a set of principles be established to determine when the freedom of a landowner can and should be restricted in order to promote the common good? Can an objective set of guidelines be established to control administrators' decisions? The treatise records the existence of these issues but offers no solutions. Are land development controls really so incapable of objective expression that legislative fiat—such as the street intersections rule—is the only fair and certain way of proceeding?

Continuity and Change in Constitutional Adjudication

William E. Nelson†


Must the Supreme Court apply constitutional principles derived from the thought of the Constitution’s draftsmen to contemporary problems far beyond the range of that thought? Undoubtedly the most general principles—that no state may deny persons equal protection of the laws, for example—must be drawn from the past in the sense that they must be drawn from the text of the Constitution itself. But must the Court accept the past’s subsidiary principles, such as the principle enunciated in Plessy v. Ferguson1 that state-imposed racial segregation does not violate equal protection if separate but equal facilities are provided? Or may it reformulate such principles to meet

1. 163 U.S. 537 (1896).
changing political, economic, and social conditions? These pervasive issues in constitutional adjudication have provoked much judicial and scholarly comment in recent years. But the commentators have shunned historical questions, such as the extent to which the framers of the Constitution sought to bind subsequent generations to their principles and the extent to which subsequent generations have deemed themselves so bound.

Paul Eidelberg's recent book implicitly raises these interesting historical questions. The tacit yet fundamental premise upon which all of Eidelberg's arguments rest is that prior to the Constitutional Convention the founding fathers had developed a political philosophy, that they incorporated that philosophy into the Constitution, and that that philosophy, still unchanged, remains as relevant to interpreting the Constitution today as it was in 1787. For Eidelberg, constitutional interpretation involves no more than a "compelling obligation" to ascertain that philosophy and "consider the intentions of the Founders." Eidelberg's analysis of the Constitution is primarily theoretical or, as he calls it, "dialectical." He does not resort to history for any more subtle purpose than to find the framers' "intentions." He rejects the notion "that the Constitution has meaning only as a product of certain historical circumstances" which have no present-day significance. He "den[ies] that its essence is change," and argues that it is permanence. He discovers the Constitution's permanence first in the framers' establishment of a mixed regime incorporating both democratic and aristocratic principles, and second in their creation of a Supreme Court having the power of judicial review. Some recent historical writing, however, suggests that these two contrivances were neither expected by the framers to make, nor have they in fact made, "the will of the people who established the Constitution . . . binding upon the people now living."


4. Id. 224.
5. Id. 28.
7. EIDELBERG 225.
I.

Eidelberg contends "that the Republic established by the Founding Fathers was understood by them to be a Mixed Regime."\(^8\) He sees this "mixed regime" as a compromise solution to the "fundamental and controversial question, the question of who should rule"\(^9\)—that is, which class should rule.\(^10\) In his scheme "the diversity of opinions, passions, and interests"\(^11\) fostered by democracy would find representation in the House of Representatives, while the Senate, "over against the democratic justice upheld by the House,"\(^12\) would "endow . . . the community . . . with a permanent will"\(^13\) and "uphold aristocratic justice"\(^14\) based on qualities of reason, truth, merit and excellence. The Presidency, according to Eidelberg, will preserve the balance between the two houses of Congress.\(^15\) The President is kept from succumbing to either by "the most brilliantly conceived aspect of the Constitution, namely, the presidential electoral system,"\(^16\) which renders him independent of the democratic masses and the Congress, since he is elected by neither. Instead he is elected by men who can judge his ability to fulfill the qualities demanded of the President—monarchic qualities of leadership and persuasion, by which he can convince people of the lasting rightness of his measures.\(^17\)

This essentially Beardian concept of the Constitution casting a balance between forces of democratic instability and aristocratic permanence is open to question. As is true of the history of the Revolutionary era as a whole,\(^18\) the 1787-1788 debates on the Constitution cannot be explained solely as a contest between wealthy aristocrats and impoverished democrats. Aristocrats and democrats appeared on both sides of the constitutional struggle. Democratic frontiersmen from North Carolina and western Massachusetts usually opposed the new Constitution, but similar frontiersmen from Georgia and northern New Hampshire usually supported it; aristocratic Charlestonians,
Philadelphians, and Bostonians generally favored it, but similarly aristocratic Virginians were almost evenly divided. Confusion is compounded when we look at the positions taken by those who attended the 1787 convention. Some wealthy men, such as George Washington and Robert Morris of Pennsylvania, favored the Constitution, as did some rather impoverished men, such as James Madison, Alexander Hamilton, and William Pierce of Georgia. Similarly, among the Constitution's opponents were the wealthy George Mason of Virginia and Elbridge Gerry of Massachusetts and the less wealthy Luther Martin of Maryland.

This confusion, which could be infinitely multiplied, suggests that men did not divide over economic issues. Rather they seem to have chosen sides over the central political concern of eighteenth-century Americans—how best to preserve liberty and restrain power. They saw power as an "encroaching," "insatiable" and "brutal" force, not because of its own nature, for power was an inherent and necessary element of government, but because of "the nature of man—his susceptibility to corruption and his lust for self-aggrandizement." Everyone agreed that men were subject to corruption when power fell into their hands. The greatest danger of all occurred when men joined together in parties or factions, which usually were monarchic, aristocratic, or democratic in composition, and one such faction gained control of the government; a faction in control "necessarily prove[d] destructive to the . . . Rights of the People . . . ." Liberty could be preserved, however, by mixing elements of all three factions in one constitution, where they could counteract each other and thereby keep the body politic stable and healthy. The English constitution in particular embodied this theory of mixed government: the king gave the

23. Id. 40.
24. Id. 40-41; O. Handlin & M. Handlin, The Popular Sources of Political Authority 27 (1966); J. T. Main, supra note 19, at 9, 127-28.
element of monarchy; the House of Lords, aristocracy; and the House of Commons, democracy. And, although the analogy was not perfect, colonial Americans conceived of their governments as embodying the same mixture.

Some who participated in the framing and ratification of the Constitution were thinking, perhaps, in these traditional terms of achieving a socio-constitutional balance among monarchy, aristocracy and democracy. But the best minds were thinking new thoughts, and Constitutional theory was undergoing a subtle evolution—an evolution which Eidelberg ignores. The impetus for modification derived from the failure of the doctrine of mixed government to square with the reality of political conditions in America. Two of the three elements necessary to proper balance were missing: “kings we never had among us . . . ; nobles we never had . . . ,” wrote John Adams. Nor did Americans of the Revolutionary generation mean to create kings and nobles. Virtually all Americans were determined that their government should be of republican form, and, as James Madison wrote, a republican government must derive “all its powers directly or indirectly from the great body of the people”—that is, from the “democracy.” Of course, even with all governmental power derived from the people, men still feared threats to liberty from factional seizures of power, for factions, they now realized, need not arise from institutionalized socio-economic divisions; they could spring as well from “an attachment to different leaders” or from “different opinions concerning religion[,] . . . Government, and many other points.” In

30. Cf. The Federalist No. 39, at 281 (B.F. Wright ed. 1961). Even the executive, it was thought, must derive its powers from the people, see W. GwYN, The Meaning of the Separation of Powers 122-24 (1965), although popular election of the President was precluded, and election through the medium of the Electoral College and the House of Representatives was required by the founding fathers' anticipation that it would be impossible for people from one part of the country to be aware of the qualifications of presidential candidates from other parts and by the founders' fear that people would always vote for candidates from their own state, thus giving the large states the best chance of securing the Presidency. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1966) (cited hereinafter as Records), at 29 (remarks of Mr. Sherman), 30 (remarks of Mr. Pinckney), 31 (remarks of Col. Mason), 32 (remarks of Mr. Williamson). The Electoral College may initially have obscured the relationship of the executive to the people, but by the 1830's it was becoming clear that the President, as much as the Congress, did represent the people. See W. GwYN, supra, at 124.
addition, the possibility remained that, apart from a factional seizure of power, individual representatives would betray their trust; these individual governors also had to be deterred from tyranny.\textsuperscript{32}

Since the old socio-constitutional balance of mixed government was not relevant to American political conditions, men sought to create new balances.\textsuperscript{33} Most early state constitutions failed to create them, giving virtually all power to legislatures elected by the “democracy.” The result was that, at least in contemporary eyes, majority factions gained power and enacted legislation which oppressed minorities.\textsuperscript{34} Several states dimly perceived the possibility of attaining balance through application of the doctrine of separation of powers, originated by seventeenth-century English republicans and resurrected by Montesquieu; but none of them paid more than lip service to the doctrine before establishing a government which violated it.\textsuperscript{35} Only gradually, during the course of the debates on the framing and ratification of the Constitution, did a third doctrine emerge—that of checks and balances. The principal author was James Madison, although others participated in formulating the new concepts.\textsuperscript{36}

Madison’s doctrine of checks and balances was a variant of the separation of powers theory, which he perceived to mean not that the legislative, executive, and judicial powers must be kept completely separate in three governmental departments, but only that “where the whole power of one department is exercised by the same hands which possess the whole power of another department, the funda-

\textsuperscript{32} See C. Kenyon, supra note 21, at lxiii-lxiv.
\textsuperscript{33} See Bailyn, supra note 18, at 351.
\textsuperscript{34} See, e.g., The Federalist No. 10, at 129-30 (B.F. Wright ed. 1961) (Madison).
\textsuperscript{35} See A. Nevins, The American States During and After the Revolution, 1775-1789, at 165-66 (1924); M. Vile, supra note 27, at 132-34, 141; Corwin, The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention, 30 Am. Hist. Rev. 511, 514 (1925). The doctrine of separation of powers—that different institutions should make, enforce and interpret the law—was also inadequate because it was easily confused with the doctrine of mixed government—that different social groups should participate in all three institutional functions. An excellent example of a person succumbing to such confusion is John Adams, who argued that the legislative, executive, and judicial powers should be not merely separated from, but also balanced against, each other. To prevent the legislature from overwhelming the executive and the judiciary, he advocated

the adoption of a mixed constitution with an aristocratic chamber in the legislature to hold the balance between the monarchic executive and the democratic legislative chamber. Adams thus proposed two overlapping sets of checks and balances: the three branches of the government and the monarchic, aristocratic, and democratic parts of the legislative branch.


\textsuperscript{36} Cf. W. Gwyn, supra note 30, at 122-23; M. Vile, supra note 27, at 152-54, 158-60.
mental principles of a free constitution are subverted.\textsuperscript{37} Madison believed that true separation could not be insured by a mere “Constitutional discrimination of the departments on paper.”\textsuperscript{38} For experience had taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper. Instead therefore of contenting ourselves with laying down the Theory in the Constitution that each department ought to be separate & distinct, it was proposed to add a defensive power to each which should maintain the Theory in practice.\textsuperscript{39}

Madison accordingly suggested that the executive should be given a legislative power—namely, the veto.\textsuperscript{40} And on the basis of his political theory, the Senate was given the power to advise and consent upon treaties and presidential appointments—a power of an executive nature.

Madison’s doctrine of blending powers, all of which were ultimately derived from the people, so that they could check and balance each other, quickly became the staple of American political thought.\textsuperscript{41} While the exact date at which the new replaced the old cannot be determined, it is probably meaningless, no matter what that date, to analyze the Constitution, as Eidelberg does, as essentially a product of the traditional mixed government doctrine; for this doctrine was soon forgotten. Madison’s new theory, premised upon the nonexistence of classes, was concerned with establishing institutional safeguards for the separation of powers, not with achieving class balance; it was concerned with establishing a complex system of institutional controls in order to protect the people from their own and their representatives’ evil tendencies,\textsuperscript{42} not with structuring the executive and legislative

\textsuperscript{37} The Federalist No. 47, at 338 (B.F. Wright ed. 1961) (Madison).
\textsuperscript{38} 2 id. 77.
\textsuperscript{39} Id.
\textsuperscript{40} See id.
\textsuperscript{41} See M. Vile, supra note 27, at 160. Although in the early nineteenth century some extreme Jeffersonian thinkers did not accept the doctrine of checks and balances, including Jefferson himself during the last years of his life, see id. at 161-72, they were a negligible minority which did not significantly alter the mainstream of American constitutional thought. See A. Schlesinger, Jr., The Age of Jackson 18-26 (1950).

Related to Madison’s concept of checks and balances was his view of federalism as a restraint upon factionalism. His contention here was that, while in a small democracy one faction might be able to gain complete power, in a large, federal government there would always be so many factions that no one would ever form a majority. Thus, federalism combined with checks and balances to insure a perpetual diffusion of power. See A. Koch, Jefferson and Madison 37-39 (1950); Corwin, supra note 55, at 534-56; Riemer, supra note 25, at 37.
\textsuperscript{42} See Riemer, supra note 25, at 38-39.
branches in order to create permanent preserves of aristocratic privilege. The founding fathers did not seek to impede democratic majorities from enacting legal or constitutional change through proper constitutional procedures. Having participated in a revolution, they knew that change was inevitable whenever a majority was determined upon it. Many shared Jefferson’s conviction, without carrying it to the extreme he did, that “no society can make a perpetual constitution”; amendments, the framers were certain, would be “necessary.” Several members of the 1787 convention, including Washington and Hamilton, labelled the Constitution an “experiment”; and even Madison, who had greater hopes for the Constitution’s endurance, observed that “in framing a system which we wish to last for ages, we should not lose sight of the changes which ages will produce.”

II.

Especially because the founding fathers recognized the inevitability of constitutional change, Eidelberg’s argument that their political philosophy, as incorporated in the Constitution, was antithetic to change seems unpersuasive. Eidelberg, however, has a further argument. He contends that the framers’ creation of a Supreme Court with the power of judicial review gives rise, as a matter both of logic and of history, to the notion of a permanent Constitution. He explains:

[T]o preserve the Constitution as a permanent law is the only theoretical justification for investing judges with a permanent tenure and with the power of judicial review. Otherwise the judiciary, far from being the least, would be the most dangerous branch of American government. A President may err; a Congress may be partial; but the error and partiality may be corrected by

43. See 2 Records 558 (remarks of Mr. Hamilton); Riemer, supra note 29, at 46-47.
44. 5 The Writings of Thomas Jefferson 121 (P. Ford ed. 1895). Jefferson’s extreme position was that, since “the earth belongs always to the living generation . . . [and] every constitution, then, and every law, naturally expires at the end of 19 years.” Id.
45. 1 Records 202-03 (remarks of Col. Mason).
46. 3 id. 302-03 (letter of Pierce Butler to Weedon Butler, May 5, 1788); Corwin, The Constitution as Instrument and Symbol, 30 Am. Pol. Sci. Rev. 1071, 1073, 1075 (1936); cf. 2 Records 221 (remarks of Mr. Ghorum); 1 S.E. Morison, The Life and Letters of Harrison Gray Otis 267 n.9 (1913). See generally P. Nagel, One Nation Invincible 19-31 (1954), an excellent study of the concept of Union in American thought between the Revolution and the Civil War.
47. 1 Records 422. See also 2 id. 221; A. Koch, supra note 41, at 70-74; P. Nagel, supra note 46, at 27.
48. See pp. 514-15 infra.
the turn of the electorate. Not so with the judges of the Court. Their errors and partialities are permanently engrafted upon the Constitution, become part of the body of constitutional law. Should they read what is merely their own personal preferences into the Constitution, the dominant opinions of the day, that Constitution will have been permanently damaged. . . . [If judges were to regard the Constitution simply as a "developing law"]—and advocates of this notion have in mind a law without fixed or permanent standards—or if the judicial interpretation of the Constitution were simply to reflect the changing opinions of popular majorities, the Supreme Court might as well be a temporary body chosen by the people or by the people's representatives. But then there would be no theoretical justification for the Court to review, with the power to annul, the acts of a popularly elected legislature. Basically, such a court would be nothing more than an instrument of democratic justice. . . .

Such a court would be the degradation of the Court established by the Founders. 50

Eidelberg is probably correct in saying that the Founders did not foresee that the Supreme Court would be an institution which would change the Constitution. The Court was to be an agency of permanence and stability. When opponents of the Constitution argued that "the power of construing the laws according to the spirit of the constitution [would] enable that court to mould them into whatever shape it may think proper," Hamilton answered in the Federalist that such an argument was "made up altogether of false reasoning upon misconceived fact" 51—a conclusion which could "be inferred with certainty, from the general nature of the judicial power . . . ." 52 Contemporary commentators were almost unanimous in assuming 53 that it was "the duty of judges to conserve the law, not to change it . . . ." 54 Judges were "no more than the mouth that pronounces the words

50. EIDEBERG 241-42.
52. Id. 508.
53. One exception is Bishop Hoadley, who in 1717 observed that "whoever hath an absolute authority to interpret . . . laws . . . is truly the law-giver . . . , and not the person who first wrote or spoke them." Quoted in Powell, The Logic and Rhetoric of Constitutional Law, 15 J. PHILOSOPHY, PSYCHOLOGY & SCIENTIFIC METHODS 645, 652 (1918), See also James Otis's argument in the Writs of Assistance Case, Quincy 395 (Mass. 1761), where Otis makes the distinction familiar to modern lawyers that it is "better to observe the known Principles of Law ye [than] any one Precedent . . . ." Id. at 478. However, the present reviewer's research through the records of several thousand unpublished Massachusetts cases in the 1760's, 1770's, and 1780's tentatively indicates that few eighteenth-century American lawyers understood the full import of Otis's distinction and Hoadley's statement.
of the law, mere passive beings, sworn to decide cases "according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." They had no "power to repeal, to amend, to alter . . . or to make new laws . . . [for] in that case they would become legislators . . .," and "a knowledge of mankind, and of Legislative affairs . . . [could not] be presumed to belong in a higher . . . degree to the Judges than to [legislators]." The special skill of judges lay in their knowledge of the "strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . .." Trained in an era when rapid social change was only beginning to occur, lawyers belonging to the Revolutionary generation could find plausible what is for us a naive theory of the judicial function and could imagine that the role of the Supreme Court under the Constitution would be "to ascertain its meaning," not to fit it to new conditions as they arose. It was only later, as the Constitution's meaning had to be ascertained in application to particular cases, that lawyers became aware that "strict rules and precedents" rarely provided clear, incontestable answers.

Thus, Eidelberg's argument about the "intentions" of the framers concerning the role of the Court is quite likely correct. But even though the framers probably "intended" the Supreme Court to be an agency of stability, they also "intended" the Constitution to be capable of change—an "intention" which Eidelberg ignores, perhaps because, from his twentieth-century perspective, it is more easily ignored than reconciled with the "intention" which he does consider. For reconciliation can be accomplished only by accepting the framers' assumption that the people retained a realistic power under article V to amend "or abolish the established Constitution, whenever they find it inconsistent with their happiness . . . ." "The people were in fact, the fountain of all power, and . . . they could alter constitutions as they pleased." Difficulty in securing future constitutional amendments was neither desired nor anticipated; Jefferson, for one, assumed

56. 1 W. Blackstone, Commentaries *69.
57. J. Varnum, The Case, Trevett Against Weeden 27 (1787).
58. 2 Records 76 (remarks of Mr. L. Martin); accord, 1 id. 97-98 (remarks of Mr. Gerry); 2 id. 73 (remarks of Mr. Churum).
60. Id. 492.
61. Id. 494.
62. 2 Records 476 (remarks of Mr. Madison).
it would be easier to secure future amendments than to obtain ratification of the original Constitution. The Convention agreed that “it . . . [was] desirable . . . that an easy mode should be established for supplying defects which will probably appear in the new system,” and accordingly “provision . . . [was] made for the amendment of the articles of Union, whensoever it shall seem necessary.”

Because Eidelberg failed to consider the framers’ assumptions that the Constitution could be easily changed by amendment and to study why those assumptions proved false during the nineteenth century, he did not formulate a sophisticated historical analysis of the Supreme Court’s role in the constitutional system. One simply cannot write about the Court’s role and not consider why, at least since the end of Reconstruction, the Court has produced constitutional change of the same magnitude and significance as that originating in the Congress.

The views of some modern commentators suggest one hypothesis: since “[c]onstitutional law must grow and change in response to the needs of the community but . . . we rarely reform it by amendment,” the Court should act as “the voice of the national conscience” and “should be free to step in when the political process provides no inner check . . . .” It does appear that in the mid-nineteenth century, when Congress and the nation’s other political institutions were unable to adjust the Constitution to new social conditions, such a need for judicial intervention was felt. But why did political adjustment of constitutional issues become impossible; why did Madison’s carefully conceived political machine fail to operate smoothly?

The forces which made adjustment impossible are as yet not fully explored, but the concern of eighteenth-century political theorists with restraining power suggests an answer. Although the chief argument made against the Constitution during the ratification struggle had been that its adoption would unleash forces of arbitrary power, once the Constitution had been ratified, men not only accepted it,

64. 2 Records 558 (remarks of Mr. Hamilton).
65. Id. 84 (resolution of July 23, 1787, adopted unanimously by the Convention).
66. But see discussion at pp. 514-15 infra.
67. Cox, supra note 2, at 97.
70. See generally C. Kenyon, supra note 21, at lxxi-lxxiv.
but they soon began to “learn . . . from . . . infancy, to venerate the instrument,”72 to “wish . . . [for its] inviolable preservation,”73 and to look upon it as “intended to endure for ages to come.”74 Of course, men still feared for liberty, but they came to see the Constitution as a guarantor of, not a threat to, that liberty—as “the only shield of the people,” whose dissolution would “soon be followed by the loss of all that is valuable in liberty.”75 The energies which men had previously devoted to restraining power directly and thereby preserving liberty were, it appears, now devoted to arguing for constructions of the Constitution consistent with their visions of a free society. The fears of political theorists of the Revolutionary generation that minor legislation would provide “a precedent . . . for making still greater inroads on liberty”76 were transformed into a fear that erroneous construction of the Constitution would lead to the subversion of all its checks and balances. Thus, those who sought to preserve liberty changed their tactics from the colonial practice of opposing “measures subversive of . . . Liberties”77 into a new practice of challenging laws as unconstitutional.78 In Congressional debates upon such measures as the national bank, the Alien and Sedition Acts, and the Louisiana Purchase,79 politicians “reciprocally charge[d] each other with designs to warp, subvert and destroy the Constitution itself.”80

In the mid-nineteenth century, politicians continued to use such rhetoric. They accused each other, for example, of hatching “conspiracies . . . against the Constitution” and introducing “construction[s] . . . by which it may be . . . insidiously attacked, and inevitably destroyed.”81 Perhaps such constitutional rhetoric had become somewhat

73. 7 THE WRITINGS OF THOMAS JEFFERSON 327 (P. Ford ed. 1895).
74. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819). As Corwin observed, the Constitution was no longer seen as an experiment, as an instrument subject to easy modification. Corwin, supra note 46, at 1075. See generally P. Nagel, supra note 46, at 104-44.
75. AUTOBIOGRAPHY OF AMOS KENDALL 430 (W. Stickney ed. 1872).
76. 1 B. BAILYN, supra note 22, at 64.
77. W. LIVINGSTON, supra note 26, at 148.
78. See H. VON HOLST, THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES 70-79 (1876).
80. C. Pettit, An Impartial Review of the Rise and Progress of the Controversy between the Parties Known by the Names of the Federalists & Republicans (1800), G MAGAZINE OF HIST. 325, 329 (1815).
81. CONG. GLOBE, 36th Cong., 2d Sess. 80, App. (1861) (remarks of Congressman Bingham); id., 27th Cong., 1st Sess. 47, App. (1841) (remarks of Congressman Rayner); ac-
unreal, yet it continued to have the effect of inflating issues—of transforming mere differences over policies into power struggles in which participants feared that defeat would bring perpetual tyranny at the hands of whoever should emerge victorious. As a consequence of such fears, men grew hesitant about making the concessions which are the essence of all compromise. The South, for example, despite assurances from Lincoln,82 viewed the 1860 election as portending not merely the exclusion of slavery from territories in which slavery would never have prospered, but the loss of “the power of self-government” as well.83

Unwilling to yield anything to their opponents, politicians at the same time demanded that their opponents yield all to them. In this they merely reflected their constituents, among whom, by the 1850’s, constructive thought aimed at the solution of social problems had been overwhelmed by dogmatic moral fervor and contempt for authority.84 Willing to accept nothing less than total enactment of their own panaceas, Americans of the mid-nineteenth century and the political institutions responsive to them rejected the compromises reached in the past and could not agree to new ones. During the nearly six decades between the adoption of the twelfth amendment and the beginning of the Civil War, Congress, the institution which was expected to bring about constitutional and sectional readjustment, did not propose a single constitutional amendment, and the lasting compromise of disputes through legislative interpretation of the Constitution grew increasingly difficult. But upon the burning issue of sectionalism, some sort of constitutional compromise and readjustment was essential; neither North nor South was satisfied with the constitutional system as it was functioning. It was at this point that the Supreme Court in Dred Scott consciously resolved to preserve “the peace and harmony of the country . . . [through] the settlement . . . by judicial decision” of the sectional crisis.85

82. See D. Potter, Lincoln and His Party in the Secession Crisis 319-22 (2d ed. 1862); J. Randall & D. Donald, The Civil War and Reconstruction 150 (2d ed. 1961).
Of course, the same factors which prevented congressional settlement of the sectional crisis also thwarted the Court's effort. Much of the nation in the late 1850's refused to accept the Dred Scott decision,68 and Congress in 1860-61 never gave serious consideration to the possibility that the Court might have been an appropriate institution for resolving the crisis growing out of the presidential election.67 But in less than two decades, in a similar election crisis, men did turn to the Court. Every serious proposal considered by Congress for the settlement of the 1876 election looked either to the Court's assumption of full jurisdiction over the dispute or to individual justices to provide the element of impartiality on a mediatory panel.68 Although historians have not studied the matter and we have only the word of contemporaries to rely upon, it appears that during the three decades following the 1876 election the Court "command[ed] the . . . respect and confidence of the people for whom it administer[ed] justice" to a greater extent than ever before.69 Why was the public willing to acquiesce in the Court's decisions after 1876 but not in 1857? One reason, again, might be that suggested by modern commentators: the Supreme Court cannot hope to obtain public and professional support unless its decisions are a product of "neutral principles" and of "reason rather than fiat."90 It would be interesting to inquire whether the Court's methods of doing its work changed between the 1850's and the 1870's and whether its opinions were more persuasively or neutrally reasoned at the later date; some who were adversely affected by the Court's later opinions conceded that they were at least more neutrally reasoned.91 On the other hand, changes may not have occurred

On the consciousness of the Court's desire to resolve the sectional crisis, see R. Nichols, supra note 83, at 63-66; Corwin, The Dred Scott Decision in the Light of Contemporary Legal Doctrines, 17 AM. HIST. REV. 52, 53-54 (1911).

66. 60 U.S. (19 How.) 393 (1857); see J. Randall & D. Donald, supra note 81, at 114; Corwin, supra note 84, at 63-69; Hodder, Some Phases of the Dred Scott Case, 16 MISS. VALLEY HIST. REV. 3, 21 (1929).

67. For discussion of the various proposals considered in Congress, see D. Potter, supra note 82, at 7, 61-72, 95-111; 3 J. Rhodes, supra note 83, at 159, 149-55, 160-61, 175-79, 254-59, 266-70.

68. See P. Haworth, The Hayes-Tilden Disputed Presidential Election of 1876, at 190, 197-207 (1906).

69. Cf. J. Choate, The Supreme Court of the United States 1 (1903). See also C. Beard, An Economic Interpretation of the Constitution of the United States, at vi (2d ed. 1925); S. Burke, Centennial of the Supreme Court of the United States 9 (1899); C. Haines, The American Doctrine of Judicial Supremacy 285 (1914); E. Phelps, The United States Supreme Court and the Sovereignty of the People 19-21 (1890).

70. Hart, The Supreme Court, 1938 Term—Foreword: The Time Chart of the Justices to the Supreme Court, 73 HARV. L. REV. 84, 113 (1959); Wechsler, supra note 2.

91. See W. Patton, The United States Supreme Court and the Civil Rights Act 5-6 (1884).
in judicial reasoning, or, if changes did occur, perhaps they were unrelated to the change in public attitude toward the Court. The change in attitude may have resulted simply from differences in the nature of the issues at stake, although the crisis of 1876-1877 was of nearly as great magnitude as the crisis of 1857-1861. Another possibility is that the change in attitude toward the Court may have been part of a broader change in attitude occurring after the Civil War toward all of the bonds of society—a change which manifested itself in a growing search for order and stability and, arguably, in a growing recognition that authoritative, elitist institutions were needed to attain that order and stability. Historians have yet to determine whether such a change occurred. But if it did, it might lead us to formulate a more complex and subtle analysis than we now have of the restraints which the need for public support imposes upon the Court.

In addition to investigating the failure of political institutions in the 1850’s and the shift in public attitude in the 1870’s, historians seeking to understand the complex process by which the Supreme Court became a successful facilitator of constitutional change must take into account the creativity inherent in the very nature of constitutional adjudication. It seems probable that even before the failure of the political process to produce constitutional change had been perceived or had in fact occurred, the Court under Marshall was acting as an agency of such change. Justice Frankfurter has spoken of the “creative role” of the Marshall Court “in conveying to ordinary men the meaning of the Delphic language of the Constitution.” Since it would be difficult to maintain that the Marshall Court was

92. See C.V. Woodward, Origins of the New South, 1877-1913, at 25 (1951), where it is noted:

To Abram S. Hewitt, national Democratic chairman, a peaceful solution seemed extremely doubtful in 1876. He knew of fifteen states in which Democratic war veterans were organizing for military resistance to the election ‘fraud,’ and to him ‘It seemed as if the terrors of civil war were again to be renewed.’ One historian concluded that more people expected a bloody outbreak in the crisis of 1876-1877 than had anticipated such an outcome in the crisis of 1860-1861.

93. That such a change occurred after the Civil War is suggested by the pre-War attitudes toward authority discussed at note 84 supra. At some point, the nation must have swung away from those pre-War attitudes toward attitudes more favorable to order, stability and authority. See G. Fredrickson, The Inner Civil War 186-80, 201-02, 205-11, 221-22 (1965); E. Kirkland, Dream and Thought in the Business Community, 1860-1900, at 10, 13, 26-27 (1956); G.E. White, The Eastern Establishment and the Western Experience 175, 185 (1968).


producing change in response to the failure of other institutions to produce it, any change must have been in response to something else.

Eidelberg avoided all this complexity simply by ignoring it. But it cannot be ignored; no historically grounded analysis of the Supreme Court’s institutional role can be formulated without coming to terms with the Court’s nineteenth-century history. The first step, it would appear, is to ask what exactly do we mean when we speak of the Court as bringing about constitutional change? Does such change occur only when the Court either explicitly or implicitly overrules or otherwise departs from a prior decision? Does change occur when the Court applies a constitutional principle to a novel situation? What if the authors of the principle had considered how it should be applied to the facts; would one define as change an application consistent with the thought of a majority of the authors? Should the definition of change be broad enough to encompass cases in which the Court adheres to precedent but in so doing, because of intervening changes in political, economic or social facts not considered by the Court, produces consequences for society different from those which the precedent had produced?

It is regrettable that Eidelberg did not ask such questions, for if he had, he would have seen the impossibility of analyzing the Supreme Court’s function as the founding fathers had analyzed it. The Court’s subsequent history has made plain the inadequacy of “strict rules and precedents” derived from the past. The proper question is not whether but when the Court should deviate from such rules and precedents. Perhaps by defining precisely the nature of past deviations and analyzing their causes we can begin to arrive at some answers.

96. Brown v. Board of Educ., 347 U.S. 483 (1954), would have been an example of such a case if the Court had reached the opposite result and had not taken into account the sociological findings that segregation generates a feeling of inferiority among blacks. Id. at 494. For, although public-school segregation was not beneficial to blacks at the time of Brown, it has been suggested that such segregation may have been beneficial at the time of Plessy v. Ferguson, 163 U.S. 537 (1896). See A. BICKEL, supra note 2, at 71; Frank & Munro, The Original Understanding of “Equal Protection of the Laws,” 50 COLUM. L. REV. 131, 161-62 (1950).